LIBRARY
SUPREME COURT, U.S.

FILED
JUL 14 1969
JOHN F. DAVIS, CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1969

No. 340

BERNIE LUDWIG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

GERALD KOGAN
Attorney for Petitioner
1201 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

MIAMI REVIEW — 371-4853 — 377-3721

INDEX TO PETITION

	Page
Opinion Below	1
Grounds For Jurisdiction	2
Questions Presented	2, 3
Constitutional and Statutory Provisions Involved	3, 4, 5
Statement of the Case	6, 7, 8, 9, 10
How The Federal Questions Were Raised	10, 11
Reasons For Granting The Writ	11, 12, 13, 14, 15, 16, 17
Conclusion	18

INDEX TO APPENDIX

		Page
Appendix A	Information, filed November 29, 1966	App. 1
Appendix B	Motion to Quash and Suppress, filed December 20, 1966	App. 7
Appendix C	Order Denying Motion to Quash and Suppress, entered April 14, 1967	App. 11
Appendix D	Order Denying Motion to Quash and Suppress, entered October 26, 1967	App. 13
Appendix E	Affidavit for Search Warrant, dated March 13, 1966	App. 15
Appendix F	Search Warrant, dated March 13, 1966	App. 19
Appendix G	Judgment and Sentence, filed January 5, 1968	App. 23
Appendix H	Motion for New Trial, filed October 31, 1967	App. 25

INDEX TO APPENDIX (cont.)

		Page
Appendix I	Order Denying Motion for New Trial, entered January 5, 1968	App. 27
Appendix J	Notice of Appeal, filed January 5, 1968	App. 29
Appendix K	Assignment of Errors, filed January 24, 1968	App. 31
Appendix L	Opinion of District Court of Appeal of Florida, Third District, filed November 26, 1968	App. 35
Appendix M	Order Denying Petition for Rehearing by District Court of Appeal of Florida, Third District, filed December 19, 1968	App. 41
Appendix N	Order Denying Petition for Writ of Certiorari by the Supreme Court of Florida, filed April 29, 1969	App. 43
Appendix O	Order Denying Petition for Rehearing by the Supreme Court of Florida, filed June 12, 1969	App. 45

TABLE OF CASES

	Page
Aguilar vs. Texas 84 S.Ct. 1509, (1964)	13, 14
Castillon vs. United States (CA 9, 1962) 298 F2d 256	14
Ker vs. California 374 U.S. 23, 83 S.Ct. 1623, (1963)	13
Mapp vs. Ohio 367 U.S. 643, 81 S.Ct. 1684, (1961)	12
Marron vs. United States 275 U.S. 192, 48 S.Ct. 74, (1927)	17
United States vs. Freeman (CA 2, 1966) 358 F2d 459	13
United States vs. Pearce (CA 7, 1960) 275 F2d 318	14, 15
United States vs. Ventresca (CA 1, 1963) 324 F2d 864	14
Wong Sun vs. United States 371 U.S. 471, 83 S.Ct. 407, (1963)	15, 16

in the
Supreme Court
of the
United States

OCTOBER TERM, 1969

No._____

BERNIE LUDWIG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

---

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Third District.

OPINION BELOW

The Opinion of the District Court of Appeal of Florida, Third District, affirming Petitioner's conviction, is reported in 215 So. 2nd 898 (1968), and may be found in Appendix L.

GROUNDS FOR JURISDICTION

The Sentence and Judgment of conviction of the Criminal Court of Record in and for Dade County, Florida, was entered on January 5, 1968 (Appendix G). The Opinion of the District Court of Appeal of Florida, Third District, affirming Petitioner's conviction, was entered on November 26, 1968 (Appendix L). Said Court's Order Denying Petition for Rehearing was entered on December 19, 1968 (Appendix M). The Supreme Court of Florida denied a Petition for Writ of Certiorari on April 29, 1969 (Appendix N), and denied the Petition for Rehearing on June 12, 1969 (Appendix O).

The Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution of the United States was denied by the District Court of Appeal of Florida, Third District.

QUESTIONS PRESENTED

I. A SEARCH WARRANT ISSUED PURSUANT TO AN AFFIDAVIT BASED UPON INFORMATION RECEIVED FROM AN INFORMANT, THAT FAILS TO ALLEGE THE RELIABILITY OF THE INFORMANT, IS IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. WHEN A SEARCH WARRANT SPECIFICALLY DETAILS WHICH PROPERTY IS TO BE SEIZED UNDER SAID WARRANT, EVEN IF SAID WARRANT IS VALID AND EVEN IF IT IS PROPERLY EXECUTED, PROPERTY NOT NAMED IN THE WARRANT CANNOT BE SEIZED UNDER THE AUTHORITY OF SAID WARRANT, WITHOUT VIOLATING THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensations.

AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA

SECTION 12—DOUBLE JEOPARDY:

SELF-INCRIMINATION:
EMINENT DOMAIN:
RIGHT TO WORK

No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall

private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or non-membership of any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

SECTION 22—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

TITLE 28
UNITED STATES CODE

SECTION 1257 (3)

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The Petitioner was living in Apt. 113, 333 University Drive, Coral Gables, Dade County, Florida, on March 13, 1966.

On the aforementioned date Sgt. Joseph Fernandez, a Deputy Sheriff with the Dade County Sheriff's Office, signed an Affidavit for a Search Warrant before the Hon. James Lawrence King, one of the Circuit Judges of the Eleventh Judicial Circuit of Florida, (R. 7A) (Appendix E) to the effect that he had received information from one, Antonio P. Guerra, through an Inspector Bland, of the Tampa, Florida Police Department, that certain stolen jewelry from Sarasota, Florida, had been sold to a Bernard Ludwig on the premises known as Apt. 113, 333 University Drive, Coral Gables, Dade County, Florida. The Affidavit further stated that Fernandez had been contacted by Inspector Bland who told him that Guerra had admitted stealing this jewelry and that he, Guerra, was present at the time the jewelry was sold to Ludwig. Sgt. Fernandez then stated in the Affidavit that he had reason to believe that the stolen jewelry was in the apartment of Bernard Ludwig located at the aforementioned address (R. 106-108). In the Affidavit no mention is made as to the reliability of either Guerra or Inspector Bland, and fails to affirmatively show that the jewelry in question was still on the Defendant's premises. The jewelry was described in detail in the Affidavit. Sgt. Fernandez testified he did not know Guerra and did not know if Inspector Bland knew him (R. 18A).

Pursuant to this Affidavit, a Search Warrant was issued by Judge King for the premises known as Apt. 113,

333 University Drive, Coral Gables, Dade County, Florida, (Appendix F) authorizing the search of said premises for the specific purpose of searching for the jewelry outlined by Sgt. Fernandez in the Affidavit and to seize said jewelry. The jewelry was described in the Warrant in detail (R. 108-110). The Warrant mentioned no other property to be seized other than jewelry.

Armed with said Search Warrant, Sgt. Fernandez and a number of deputies from his department and a number of Federal Agents proceeded to the Petitioner's apartment, 333 University Drive, Coral Gables, Dade County, Florida, arriving there shortly before midnight on March 13, 1966. They knocked on the door of Apt. 113 and announced that they were police officers. The Petitioner answered them by asking them to wait just a minute. The officers waited about a minute or two, knocked again and, upon hearing no answer, proceeded to break down the door (R. 11A-12A). Upon entering the premises they saw the Petitioner standing in his undershorts (R. 12A) and proceeded to give him a signed copy of the Search Warrant (R. 23A).

The officers then proceeded to search the apartment looking for the stolen jewelry set forth in the Search Warrant; but were unable to find the same (R. 12A). The officers then proceeded to seize certain fur stoles and assorted silverware including silver serving pieces, that were not named in the Search Warrant (R. 13A-14A, 111-123).

Sgt. Fernandez, during his testimony at the Motion to Suppress heard before and during the trial, admitted that none of the items seized from the Petitioner's prem-

ises were, in fact, mentioned in the Warrant or Affidavit (R. 12A-14A). He further testified that none of the jewelry outlined in the Affidavit and Warrant was found at the time of the search (R. 17A).

When asked by the Petitioner's counsel during the aforementioned testimony why he seized said property not named in the Warrant, Sgt. Fernandez said that he had reasonable grounds to believe that the furs and silver were stolen (R. 13A-14A). When asked what made him believe this, he stated that sometime before this date he had received a call from a police officer in New Orleans informing him that a fur had been stolen from a home in New Orleans from a particular person (R. 13A-14A). Sgt. Fernandez stated that one of the furs had a New Orleans label in it. However, it will be noted that the initials inside the fur do not match the initials of the person from whom it was allegedly stolen (R. 13A-14A). He further stated that, because some of the silver items and fur pieces had initials on them different from the Petitioner's, he had reason to believe that these other items were stolen as well (R. 23A-24A). Later on in his testimony Sgt. Fernandez admitted that he didn't know the seized property was stolen, and that his reasonable ground to believe that these items were stolen was merely suspicion and he took the items hoping that they might be identified as being stolen (R. 50A). The Petitioner was not arrested at that time (R. 18A-19A, 50A).

Sgt. Fernandez testified that he did not arrest the Petitioner because he did not know that the property he found at the apartment was stolen (R. 50A). Sgt. Fernandez further testified that the Petitioner was not charged with any offense until some of the items found in his apartment were identified by the true owners as having been stolen (R. 21).

The property so identified was introduced at the trial over Petitioner's objections (R. 87).

The Petitioner was originally charged in several separate Informations with violating Florida Statute 811.16, buying, receiving and concealing stolen property. The State of Florida then consolidated these cases and filed a new Information (Appendix A) charging the Defendant with six counts of buying, receiving or aiding in the concealment of stolen property (R. 94-98). The Information alleged that the Defendant, on March 13, 1966, did unlawfully, knowingly and feloniously buy, receive or aid in the concealment of certain stolen property. Each count alleged a specific piece of property owned by a separate individual.

Amongst the pre-trial motions filed by the Defendant was a Motion to Quash the Affidavit for a Search Warrant and the Search Warrant obtained by the police to search the Defendant's premises and contained within said motion was a Motion to Suppress All Evidence Seized Under said Warrant (R. 100-102) (Appendix C). After taking testimony in regards to these motions, the Court denied said motions (Appendix D & E). These same motions were renewed at the time of trial (R. 104-105) and, after again hearing testimony in regards to said motions, the Court again denied them (R. 104-105, 124) (Appendix D & E).

At the time of trial the Defendant objected to the admissibility into evidence of all property seized under the Warrant, but said objection was overruled (R. 87).

The Defendant waived trial by jury and was found guilty by the Court as to Counts 1, 2, 3, 5 and 6 (R. 89, 125) (Appendix G). The State dismissed, of its own motion, Count 4 (R. 89, 124). The Court adjudged the Defendant to be guilty as charged and sentenced him to Three (3) years in prison (R. 128-129) (Appendix G).

The Defendant's Motions for Directed Verdicts of Acquittal, both at the close of the State's case and the conclusion of the entire case, were denied (R. 88-89, 124). Defendant filed a Motion for a New Trial (Appendix H) which was also denied (R. 125-127) (Appendix I). Notice of Appeal (Appendix J) and Assignments of Error (Appendix (K) were thereafter filed by the Defendant (R. 129-133).

The history of this appeal and its results have been heretofore reviewed in this petition under section entitled Ground for Jurisdiction.

HOW THE FEDERAL QUESTIONS WERE RAISED

Prior to Trial, the federal questions were raised in the Petitioner's Motion to Quash the Affidavit and Search Warrant and to Suppress such Evidence which was obtained contrary to the Constitutions of the State of Florida and the United States (Appendix B). The Trial Court denied the aforesaid Motions (Appendix C & D).

The federal questions were raised during the Trial when the evidence seized from the Petitioner's home was introduced over Petitioner's objections and renewal of his Motion to Suppress.

The federal questions were raised after the Trial by the Petitioner's Motion for New Trial (Appendix H) which was denied by the Trial Court on January 5, 1968.

The federal questions were raised in Petitioner's Assignments of Error filed in the District Court of Appeal of Florida, Third District, (Appendix K), and in the Brief of Petitioner, and in the Petition for Rehearing in said Court which was denied on December 19, 1968 (Appendix M).

The federal questions were likewise raised in the Petition for a Writ of Certiorari filed in the Supreme Court of Florida as well as the Petition for Rehearing in said Court which was denied on June 12, 1969, (Appendix O).

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED

I

A SEARCH WARRANT ISSUED PURSUANT TO AN AFFIDAVIT BASED UPON INFORMATION RECEIVED FROM AN INFORMANT, THAT FAILS TO ALLEGE THE RELIABILITY OF THE INFORMANT, IS IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The law is clear that where an Affidavit for a Search Warrant is based upon information obtained from an Informant there must be a statement therein contained as to the Informant's reliability or credibility.

To begin with Appellant cites an appropriate statute and constitutional guaranties.

The Declaration of Rights, Section 22 of the Florida Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated and no warrants issued, but upon probable cause, supported issued, by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized."

The Fourth Amendment of the United States Constitution is almost identical with this particular section of the Florida Constitution.

In **Mapp vs. Ohio**, 367 U.S. 643, 81 S.Ct. 1684, (1961), the Supreme Court of the United States held that evidence obtained by state officers in violation of the Fourth Amendment to the United States Constitution is inadmissible in a State criminal trial. The Court said:

> "We hold that all evidence obtained in searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court."

Again in the case of **Ker vs. California**, 374 U.S. 23, 83 S.Ct. 1623, (1963), the United States Supreme Court ruled that federal standards govern in determining whether state officers have violated the Fourth Amendment and is made enforceable against the states by the Fourteenth Amendment. The Court said:

> "We specifically held in **Mapp** that this constitutional prohibition is enforcable against the States through the Fourteenth Amendment 'is enforceable against them (the States) by the same sanction of exclusion as is used against the Federal Government,' by application of the same constitutional standard prohibiting 'unreasonable searches and seizures.'"

Let us therefore examine the standards set up by the United States Supreme Court and other Federal courts in regard to the question raised in Point One of this **Brief.**

In the case of **United States vs. Freeman**, (CA 2, 1966) 358 F.2d 459, a Search Warrant had been issued based upon information received from an Informant, however the Affidavit for the Search Warrant did not state whether or not the Informant, upon whose information the Warrant was based, was, in fact, reliable or credible. The Court quoted from the famous **Aguilar vs. Texas** case, 84 S.Ct. 1509, (1964):

> "Although an Affidavit may be based on hearsay information and need not reflect the direct personal observations of the Affiant (cited authorities) the magistrate must be informed of some of the underlying circumstances from

which the Informant concluded that the narcotics were where he claimed they were and some of the underlying circumstances from which the officer concluded that the Informant whose identity need not be disclosed (cited authorities) was credible or his information reliable."

In **United States vs. Ventresca,** (CA 1, 1963) 324 F.2d 864, the Court held:

"Hearsay information received from an Informant may be used in an Affidavit to secure a search or arrest warrant **only when the Informant is shown to be trustworthy or reliable."**

The United States Supreme Court later reversed this case on other grounds but the aforementioned principle of law was left undisturbed.

In **Castillon vs. United States,** (CA 9, 1962) 298 F.2d 256, the Court held that in the case of an arrest without a Warrant that "probable cause" and "reasonable grounds" can come from an Informer, but that there must be testimony to show that the Informer, in fact, was reliable.

United States vs. Pearce, (CA 7, 1960), 275 F.2d 318, is a case on point with this one. In the Pearce case an Affidavit was signed by a law-enforcement officer claiming that the information was received from another law-enforcement officer who in turn had received it from an Informant who had proved to be reliable in the past. A Search Warrant was issued based upon this representa-

tion to the Court, and the Defendants were found in possession of stolen furs and were convicted of transporting and receiving stolen furs. The Defendants filed a Motion to Suppress stating that, in truth and in fact, the Informant was not known and his reliability was not known to the law enforcement officers, and that the statement contained within the Affidavit for a Search Warrant as to the reliability of the Informant was false. The United States Court of Appeals for the Seventh Circuit reversed the conviction because the Court found that, in truth and in fact, the Informant was not known and his reliability was not known to law enforcement officers prior to their receiving the information which was placed in the Affidavit for the Search Warrant. The Court held that, before a Search Warrant can be issued, the Informant must be "proved reliable" and such a showing must affirmatively appear in the Affidavit for the Search Warrant.

In the instant case that this Court has under consideration not only did the State fail to show that, in fact, the Informant, Guerra, was reliable, but they failed completely to mention or state that he was a reliable Informant and had been proved to be reliable in the past.

The famous case of **Wong Sun vs. United States**, 371 U.S. 471, 83 S.Ct. 407, (1963), discussed the exact same issue raised in this case. In **Wong Sun** an arrest was made of an individual and he was charged with possession of narcotics. The person arrested then told the law-enforcement officers that he had purchased this particular narcotic from the Defendant at his place of business. The officers then believed that they had probable cause to believe that the Defendant, in fact, was selling nar-

cotics from his establishment. They then proceeded to make their case against the Defendant and proceeded to arrest him based upon the information provided to them by their Informant. However, the U. S. Supreme Court said that the officers did not have probable cause to make an arrest and even if they attempted to get a Warrant for the arrest of the Defendant or a Warrant to search his business, under the fact situation as it is related here, they would be unable to get it because the reliability of the Informant must be shown before probable cause can exist for the issuance of any Arrest Warrant or any Search Warrant. The Court said even though the Informant admitted buying the narcotics from the Defendant, there was nothing to show that the officers could accept this information as being reliable.

It is submitted to the Court that the fact situation in the **Wong Sun** case in regards to the alleged probable cause is right on point with this particular case now under consideration by the Court. Again you have an individual who admits committing an offense and ties in the Defendant with the commission of that offense, but yet the United States Supreme Court clearly ruled that unless you can show the reliability of the Informant then you cannot obtain an Arrest or Search Warrant.

All of the cases cited in this Brief show quite clearly that there is no probable cause in any case where information is received from an Informant until it has been shown on the face of the Affidavit that said Informant has been proved to be reliable and that his information can be relied upon.

II

WHEN A SEARCH WARRANT SPECIFICALLY DETAILS WHICH PROPERTY IS TO BE SEIZED UNDER SAID WARRANT, EVEN IF SAID WARRANT IS VALID AND EVEN IF IT IS PROPERLY EXECUTED, PROPERTY NOT NAMED IN THE WARRANT CANNOT BE SEIZED UNDER THE AUTHORITY OF SAID WARRANT, WITHOUT VIOLATING THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The fourth amendment to the U. S. Constitution, as well as Sec. 22 of the Fla. Constitution, require that a Search Warrant particularly describe the property or thing to be seized.

This provision is set forth for the purpose of preventing the issuance of general Warrants which permit law-enforcement officers to exercise discretion as to what shall or shall not be seized under a Warrant.

In the case of **Marron vs. United States,** 275 U.S. 192, 48 S.Ct. 74, (1927), the United States Supreme Court condemned the issuance of general Warrants and stated the law thusly:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer."

It is clear that in this case property not named in the warrant was seized.

CONCLUSION

Petitioner respectfully submits that under the law previously cited the illegally obtained evidence used to convict the Petitioner herein constituted a violation of his rights under the Constitution of the State of Florida, and the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

GERALD KOGAN
Attorney for Petitioner
1201 Biscayne Building
19 West Flagler Street
Miami, Florida 33130